

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

THE WASHINGTON HARBOUR  
3000 K STREET, NW, SUITE 300  
WASHINGTON, DC 20007-5116  
TELEPHONE (202) 424-7500  
FACSIMILE (202) 424-7643  
WWW.SWIDLAW.COM

NEW YORK OFFICE  
THE CHRYSLER BUILDING  
405 LEXINGTON AVENUE  
NEW YORK, NY 10174  
TEL (212) 973-0111  
FAX (212) 891-9598

October 27, 2003

RECEIVED

OCT 27 2003

**BY HAND AND ELECTRONIC FILING**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Re: WC Docket No. 03-211; USA DataNet's Comments

Dear Secretary Dortch:

Enclosed for filing are an original and four copies of the comments of USA DataNet in the above-captioned proceeding. Please do not hesitate to contact the undersigned should you have any questions.

Sincerely,

*Andrew D. Lipman* (b7c)

Andrew D. Lipman

Enclosure

C-7 #

RECEIVED

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

OCT 27 2003

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
VONAGE HOLDINGS )  
CORPORATION )  
Petition for Declaratory Ruling )  
Concerning an Order of the )  
Minnesota Public Utilities Commission )

WC Docket No 03-211

**COMMENTS OF USA DATANET CORPORATION**

**I. INTRODUCTION**

USA DataNet Corporation ("USA DataNet") submits these comments in support of the Petition for Declaratory Ruling ("Petition") filed by Vonage Holdings Corporation ("Vonage"). USA DataNet uses Voice over Internet Protocol ("VoIP") technology to deliver leading edge products and services to its residential and business customers across the United States. USA DataNet has deployed a next-generation VoIP network to provide residential and business services. This packet-based network allows its customers to have multiple points of access to its services through wireless, telephone, and IP-enabled devices. USA DataNet uses this technology to provide its customers with innovative, value-added services.

As detailed in Vonage's Petition, the Minnesota Public Utilities Commission ("PUC") issued an Order on September 11, 2003, compelling Vonage to comply with State laws applicable to providers of "telephone service."<sup>1</sup> Among other things, the Order would require Vonage to

---

<sup>1</sup> *Complaint of the Minnesota Department of Commerce Against Vonage Holdings Corp. Regarding Lack of Authority to Operate in Minnesota*, Order Finding Jurisdiction and Requiring Compliance, Docket No. P-6214/C-03-108 (rel. Sept. 11, 2003) ("PUC Order").

obtain certification and file tariffs prior to providing service in the State of Minnesota<sup>2</sup> USA DataNet supports Vonage's Petition for a Declaratory Ruling requesting that the Federal Communications Commission ("FCC") find that the PUC is preempted from regulating VoIP services because state regulation of VoIP services conflicts with the national policy of promoting unregulated competition in the Internet and information services market<sup>3</sup>

## **II. THE FCC SHOULD ADDRESS THE PETITION IN ORDER TO ESTABLISH REGULATORY CERTAINTY**

Since Vonage filed its Petition, the United States District Court for the District of Minnesota permanently enjoined the PUC from enforcing its September 11, 2003 Order.<sup>4</sup> The Minnesota District Court found that the voice over Internet protocol ("VoIP") was not a "telecommunications service" under federal law<sup>5</sup> The Court further found that the PUC was preempted from regulating VoIP since there was

[N]o statutory intent to regulate VoIP, and until Congress speaks more clearly on this issue, Minnesota may not regulate an information service provider such as Vonage as if it were a telecommunications provider [VoIP] is essentially the enhanced functionality on top of the underlying network, which the FCC has explained should be left alone<sup>6</sup>

In light of the District Court's decision, the FCC should find that VoIP is an interstate information service Even though the court has ruled on the specific Minnesota order targeted in Vonage's Petition, an FCC ruling on these issues is still needed due to the numerous states that

---

<sup>2</sup> See PUC Order, at 8-9

<sup>3</sup> See 47 C.F.R. § 230(b)(2)

<sup>4</sup> See *Vonage Holdings Corporation v. Minnesota Pub. Utils. Comm'n*, Civil No. 03-5287 (Oct. 16, 2003), at 20 ("District Court Order")

<sup>5</sup> See *id.*

<sup>6</sup> *Id.*

are actively involved in classifying VoIP services while this Petition is pending. The FCC should act to restore certainty concerning the unregulated status of VoIP services. One sure way to destroy the VoIP industry is to allow states to exercise jurisdiction over such services and subject VoIP to inconsistent regulations and charges that simply do not have corollaries in the world of non-geographic, packet-switched networks. State commissions are already attempting to graft regulations developed for traditional, circuit-switched telephone network services onto the packet-switched VoIP services that threatens to hamstring this innovative technology. The FCC should affirmatively act to avoid burdening VoIP providers with asymmetrical regulations developed to introduce competition into monopoly markets. Otherwise, the imposition of such regulation may severely impede continued VoIP deployments.

The need for FCC action is illustrated by the numerous state commissions that are actively considering VoIP issues while this Petition is pending. If the FCC fails to act promptly, VoIP may become subject to a patchwork of state regulations. Despite the finding by the Minnesota District Court that the PUC was preempted from enforcing its order, a number of states continue to attempt to regulate VoIP service offerings or are actively considering VoIP-related issues.

Prior to the Minnesota District Court's Order, the California Public Utilities Commission ("CPUC") sent a letter to six VoIP providers stating that they were subject to state jurisdiction and regulation since they were offering intrastate telecommunications services.<sup>7</sup> Although it is aware of the Minnesota District Court's ruling, the CPUC has maintained that VoIP providers must comply with legacy telecommunications regulations. Similarly, the Wisconsin Public Service Commission has sent letters to a number of VoIP providers and recently indicated that

---

<sup>7</sup> See California PUC Challenges Six VoIP Providers, Vol. 2, No. 33 New Telephony (Oct. 8, 2003) <<http://www.newtelephony.com/news/705.html>>

one such provider's fees charged to customers for intrastate services are void and not collectible.<sup>8</sup> The Washington State Utilities and Transportation Commission ("WUTC") is considering VoIP issues in the context of a complaint brought against a VoIP provider by the Washington Exchange Carrier Association.<sup>9</sup> While the complaint was originally brought in federal district court, the court referred certain issues relating to VoIP to the WUTC.<sup>10</sup> The WUTC is now in the process of defining the scope and substance of its inquiry, but will ultimately consider issues relating to VoIP. Similarly, the Oregon Exchange Carrier Association has filed a complaint with the Public Utility Commission of Oregon against a VoIP provider for the payment of intrastate access charges after a court dismissed the complaint under the Primary Jurisdiction Doctrine.<sup>11</sup> Further, a group of ILECs petitioned the Alabama Public Service Commission ("ALPSC") for a declaratory ruling concerning the regulatory classification of VoIP service providers and VoIP traffic.<sup>12</sup> In response to the petition, the ALPSC has established a comment and reply comment period.<sup>13</sup> Finally, the New York Public Service Commission has opened a generic proceeding to

---

<sup>8</sup> See 8x8 Announces Receipt of Notification From Pub. Serv. Comm'n Of Wisconsin, 8x8, Inc. Press Release (Sept. 12, 2003) <[http://biz.yahoo.com/prnews/030912/sff063\\_1.html](http://biz.yahoo.com/prnews/030912/sff063_1.html)>

<sup>9</sup> See *Washington Exchange Carrier Assoc. et al. v. LocalDial Corp.*, Notice of Pre-Hearing Conference, Docket No. UT-031472 (rel. Sept. 29, 2003).

<sup>10</sup> See *Washington Exchange Carrier Assoc. et al. v. LocalDial Corp.*, Stay Order and Order of Referral to WUTC, Case No. C03-5012 (Sept. 4, 2003).

<sup>11</sup> See *Oregon Exchange Carrier Assoc. et al. v. LocalDial Corp.*, Complaint, Docket No. UCB-19 (Oct. 13, 2003).

<sup>12</sup> See *Petition for Declaratory Relief Regarding Classification of Phone-to-Phone IP Telephony Service*, Petition, Docket No. 29016 (filed Jul. 30, 2003).

<sup>14</sup> See *Petition for Declaratory Order Regarding Classification of IP Telephony Service*, Order Establishing Declaratory Proceeding, Docket No. 29016 (Aug. [INSERT], 2003).

consider VoIP-related issues based on a complaint filed by Frontier Telephone of Rochester, Inc against Vonage<sup>14</sup>

The need for FCC action concerning VoIP is clear. Currently, six states are considering the issue and many more could join the fray at any moment. The lack of any clear guidance from the FCC and the potential for conflicting state commission determinations, contradictory court rulings and ongoing litigation threatens to jeopardize the fledgling VoIP industry. The FCC has recently indicated that it intends to open a Notice of Inquiry concerning VoIP. Meantime, the pending Vonage Petition offers the FCC the ability to rule on the jurisdiction of state commissions to subject such services to regulation. A FCC ruling on the Petition affirming that it alone possesses jurisdiction over such services will also provide crucial guidance to courts that are faced with VoIP-related disputes.

VoIP technology is still a nascent and developing technology. If it is left free to respond to market forces and customer expectations, it may become the next “killer application” spurring broadband deployment. IP-enabled networks allow for the combination of voice, data, video and other applications in a manner that the circuit-switched network cannot. Forcing one form of VoIP service – voice – into a regulatory category separate from other IP-enabled services will only hamper the benefits of VoIP services, deny consumers innovative technology, and erode competition in the communications and information services marketplace.

---

<sup>14</sup> See *Complaint of Frontier Telephone Rochester, Inc Against Vonage Holdings Corp Concerning Provision of Local Exchange and Interexchange Telephone Service in New York State in Violation of the Public Service Law*, Case 03-C-1285 (NY PSC filed Sept. 10, 2003).

### III. VoIP Services Should Remain Unregulated

Over two decades ago, the FCC adopted a policy of not subjecting enhanced or information services to regulation and recognized that leaving such services unregulated promoted important national policies.<sup>15</sup> The FCC first established the distinction between “basic services” and “enhanced services” in its 1980 *Computer II* decision.<sup>16</sup> The FCC determined that “enhanced” services provided via telecommunications are not “basic” services and thus not subject to Title II regulation. In *Computer II*, the FCC defined “basic services” as “the common carrier offering of transmission capacity for the movement of information.”<sup>17</sup> The “basic” service category was intended to define the transparent transmission capacity that makes up conventional communications service.

By contrast, the FCC defined unregulated “enhanced services” as:

services, offered over common carrier transmission facilities used in interstate communications, which [1] employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information, [2] provide the subscriber additional, different or restructured information, or [3] involve subscriber interaction with stored information.<sup>18</sup>

A service that meets any one of the three prongs will qualify as enhanced and not subject to common carrier regulation under Title II of the Act.

---

<sup>15</sup> See generally *Second Computer Inquiry*, 77 F.C.C. 2d 384 (1980) (“Computer II”).

<sup>16</sup> See *id.*, see also 47 C.F.R. 64.702(a) (“Enhanced services are not regulated under Title II of the Act.”)

<sup>17</sup> *Computer II*, at 420.

<sup>18</sup> 47 C.F.R. § 64.702(a).

The policies underlying the FCC's decision in *Computer II* are clear. The FCC concluded that regulation of enhanced services is unwarranted because the market for those services are competitive and consumers benefit from that competition.

[R]egulation of enhanced services is not required in furtherance of some overall statutory objective. In fact, the absence of traditional public utility regulation of enhanced services offers the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network.<sup>19</sup>

The FCC reached this conclusion notwithstanding the close relationship between the services provided by basic services and some services it classified as enhanced. The FCC noted that although some enhanced services provide some of the same functions as regulated telecommunications services, the data processing component of enhanced services justified different treatment.<sup>20</sup>

With the passage of the 1996 Telecommunications Act, new definitions were introduced. The 1996 Telecommunications Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public or to such classes of users as to be effectively available directly to the public regardless of the facilities used."<sup>21</sup> The term "telecommunications" is defined as "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."<sup>22</sup> The definition of "telecommunications" and "telecommunications service" can be contrasted with "information service." An "information service" is defined by the 1996 Tele-

---

<sup>19</sup> See *Computer II*, at 387.

<sup>20</sup> *Id.* at 435.

<sup>21</sup> See 47 U.S.C. § 153(46).

<sup>22</sup> See 47 U.S.C. § 153(43).



communications Act as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”<sup>23</sup>

The FCC clearly intended to prevent state commissions from imposing common carrier regulation on information services. In the *Report to Congress*, the FCC recognized that subjecting information services to state regulation may harm the development of such services since states could impose varying regulations and subject information service providers to certification, tariffing and reporting requirements.<sup>24</sup> The FCC found that subjecting information services to this type of regulation would inhibit the deployment and growth of these services to the detriment of the public interest.<sup>25</sup> The FCC must preserve Congress’ intent and rule that states are preempted from regulating VoIP services. To do otherwise would be to subject VoIP services to the very harms that the FCC foresaw and Congress hoped to avoid.

---

<sup>23</sup> 47 U.S.C. § 153(20)

<sup>24</sup> *See id.* at ¶ 48

<sup>25</sup> *See id.*

#### **IV. CONCLUSION**

For the reasons detailed herein, USA DataNet respectfully requests that the FCC promptly rule and preempt VoIP services from state regulation. Specifically, FCC action is needed as six states are actively considering issues that will impact VoIP services and potentially subject such services to state regulation. Further, the VoIP industry is still in its infancy and regulation threatens to hamper its development and continued deployment. Finally, the dichotomy between information and telecommunications services was established by the FCC and endorsed by Congress. Congress expressed its intent that information services should remain unregulated. For these reasons and because of the District Court's findings, the FCC should preempt states from imposing common carrier regulation on VoIP services.

Respectfully submitted,

/s/

Andrew D. Lipman  
Swidler Berlin Shereff Friedman, LLP  
3000 K Street, NW, Suite 300  
Washington, DC 20007

October 27, 2003